

STATE OF MICHIGAN
IN THE SUPREME COURT

IN RE REQUEST FOR ADVISORY
OPINION REGARDING
CONSTITUTIONALITY OF 2005 PA 71.

SC: 130589

**REPLY BRIEF OF ATTORNEY GENERAL
OPPOSING CONSTITUTIONALITY OF 2005 PA 71**

Oral Argument Requested

Michael A. Cox
Attorney General

Thomas L. Casey
Solicitor General

Henry J. Boynton (P25242)
Assistant Solicitor General

Ron D. Robinson (P35927)
Assistant Attorney General
Division Chief
Civil Rights & Civil Liberties Division
Cadillac Place Bldg., Ste. 10-200
3030 W. Grand Blvd.
Detroit, MI 48202
(313) 456-0200

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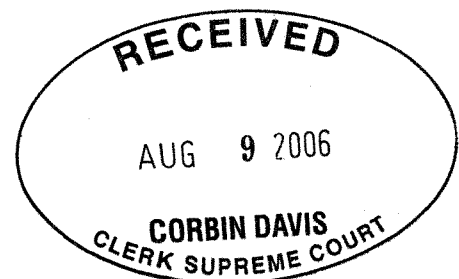


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Argument

1. This Court lacks jurisdiction to issue an advisory opinion on the constitutionality of the photo identification requirements legislation.

In the Attorney General's Brief Opposing the constitutionality of the photo identification requirements legislation, we argued that the time during which this Court is permitted to issue an advisory opinion under Const 1963, art 3, § 8 has expired – since neither the re-enactment of that legislation nor the Attorney General's Opinion, 1997-1998, No. 6930 (January 29, 1997) changed its March 31, 1997 effective date. All other briefs quickly concluded, generally in jurisdictional statements, that this Court had the jurisdiction to issue an advisory opinion. One brief, however, requires a reply.

The Michigan House of Representatives' brief, in a three page footnote, appears to invite this Court's review of the Attorney General's power to issue an opinion declaring a statute unconstitutional and whether such an opinion binds State agencies. But these questions are neither before this Court nor appropriate for an advisory opinion under Const 1963, art 3, § 8. In short, the Michigan House of Representatives' argument compounds its error – of asking for this Court's advisory opinion when the time to do so has expired – by suggesting that this Court review of the Attorney General's power to issue an opinion that a statute is unconstitutional and the legal effect of such an opinion. Clearly, the Michigan House of Representatives is brimming with questions that it would like this Court to answer. But their latest invitation as well as their initial request for this Court's advisory opinion under Const 1963, art 3, § 8 should be declined.

In our opening brief, we quoted from an earlier opinion of this Court that "Article 3, Section 8 was an innovation in the 1963 Michigan Constitution, a departure from the historic

judicial scheme" with "the intent ... for sparing resort to this mechanism."¹ What the Michigan House now seeks is nothing less than a re-write of the Michigan Constitution whereby the Michigan House is able to request an advisory opinion *at any time on any subject*.

This Court's authority to issue opinions outside of the historic judicial scheme is both limited by and plainly stated in Mich Const 1963, art 3, § 8. That constitutional provision does not authorize this Court to issue an advisory opinion on the constitutionality of the photo identification requirements in Section 523, since the legislation containing those requirements became effective nearly ten years ago. Moreover, the Attorney General's powers and the legal effect of an Attorney General opinion are not proper questions for an advisory opinion since neither are the subject of legislation that has been enacted but not taken effect.

2. This Court may choose to employ a stricter constitutional standard than that used in *Burdick v Takushi*.

The briefs supporting constitutionality argue that *Burdick v Takushi* is controlling in this case.² They contend *Burdick* requires a more flexible standard applies whereby the rigorousness of the inquiry into the validity of a State election law will depend upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights. They further argue that the burden of requiring photo identification by Section 523 is not severe and even if it was, that the affidavit procedure authorized by Section 523 cures any constitutional infirmity.

The review standard employed in *Burdick* is not controlling. Although the Michigan Court of Appeals has applied that standard in a case that pertained to the ballot itself,³ this Court has yet to determine whether the standard employed in *Burdick* or whether a stricter standard

¹ See, Brief of Attorney General Opposing Constitutionality of 2005 PA 71, p 3, quoting *In Re Constitutionality of 1977 PA 108*, 402 Mich 83, 86; 260 NW2d 436 (1977).

² *Burdick v Takushi*, 504 US 428; 112 S Ct 2059; 119 L Ed 2d 245 (1992).

³ *McDonald v Grand Traverse Election Comm'n*, 255 Mich App 674, 682-683; 662 NW2d 804 (2003).

under Michigan law would apply to a regulation that limits an individual's right to vote. As our initial brief noted both the Michigan Constitution, which specifically references political rights, and this Court's decision in *Michigan State UAW Community Action Program Council v Secretary of State*,⁴ which held that the government must demonstrate a compelling State interest in order to prevail in enacting a law that impedes the constitutional right to vote, both support the imposition of a stricter test.

Those supporting constitutionality argue that *Michigan State UAW* should not be followed since it was decided before *Burdick* clarified that the level of the burden determines the level of review. Moreover, it is argued that *Michigan State UAW*, which revoked voter's registration, is distinguishable since Section 523 does not impose a severe burden. These claims, however, overstate the matter. First, while this Court may indeed choose to follow *Burdick*, it is not required to do so with respect to Section 523.⁵ Thus, this Court may choose to employ a stricter standard under Michigan law. Second, although *Michigan State UAW* involved a different burden that does not mean that Section 523 does not impose a severe burden.

3. The right of the individual to vote is a fundamental right that should be paramount when balancing the interests involved.

The briefs supporting constitutionality place great reliance on the right of the government to regulate the time, place and manner of elections, citing Const 1963, art 2, § 4 and thereby "preserve the purity of elections." But this right of the government, while an important one, should not be viewed as being equal to the *fundamental* right of the individual to vote since voting is a "fundamental right preservative of all rights."⁶ Moreover, as this Court has noted, the

⁴ *Michigan State UAW Community Action Program Council v Secretary of State*, 387 Mich 506; 198 NW2d 385 (1972).

⁵ *Harvey v State*, 469 Mich 1, 6 n 3; 664 NW2d 767 (2003).

⁶ *Yick Wo v Hopkins*, 118 US 356, 370; 6 S Ct 1362; 30 L Ed 220 (1884).

laws to regulate elections "must be reasonable, uniform, and impartial, and must be calculated to facilitate and secure, rather than subvert and impede, the exercise of the right to vote."⁷ It is by this standard that the constitutionality of Section 523 should be measured.

4. Requiring photo identification of the 350,000 Michigan citizens that don't have it constitutes a severe burden by placing an onerous cost on those who are least able to afford it.

The briefs supporting constitutionality argue that requiring photo identification at the polls does not impose a severe burden since it is neither discriminatory nor does it present a hardship. They claim that having photo identification is a modern day fact of life and that persons must routinely show such identification to accomplish any number of tasks. It is further claimed that no hardship results because obtaining photo identification is easy and should not present a problem. But a closer inspection shows otherwise.

While having photo identification, such as a driver's license, may truly be a fact of life for the majority of Michigan adults, there are nonetheless approximately 350,000 Michigan citizens who do not have a driver's license. This is not a tiny minority of Michigan citizens, but a number that exceeds the combined population of Grand Rapids (197,800) and Flint (124,983) according to the 2000 census. Nor is there any evidence that these 350,000 Michigan citizens are more likely to attempt to vote fraudulently. In short, there is simply no nexus between the lack of photo identification and the incidence of voter fraud.

It is argued that photo identification requirements are necessary to prevent voter fraud, even though there is scant evidence to support the claim that voter fraud at the polls has been a problem. Those supporting constitutionality argue that this Court should also consider that the *potential* for voter fraud at the polls exists, citing newspaper articles that claim there are as many

⁷ *Attorney General v City of Detroit*, 78 Mich 545, 552-553; 44 NW 388 (1889).

as 50,000 registered voters who were listed in a database of Social Security Administration death claims. Even if that claim was true, it certainly is not a problem that was caused by the 350,000 persons who do not have photo identification. Moreover, it seems unreasonable to require those who are least able to afford it to effectively pay the cost to correct that problem, particularly since requiring photo identification will do nothing to reduce the alleged 50,000 still-registered voters who are deceased. Surely a much less costly and more efficient administrative remedy can be devised to ensure that deceased persons are removed from the list of registered voters instead of requiring photo identification at the polls. For example, a death certificate could require information whether the deceased was registered to vote and, if so, where? That information could then be forwarded to the Secretary of State or other responsible parties.

5. Requiring the purchase of photo identification constitutes a de facto poll tax. Section 523's affidavit provision does not cure its constitutional infirmity since those not purchasing photo identification are subjected to a challenge process that is both burdensome and vague.

In our initial brief we argued that the cost for obtaining a Michigan State identification card (\$10) or a driver's license (\$25), was but one of a series of associated costs one must pay in order to meet the identification requirements of Section 523. These associated documents include certified copies of birth certificates (which range from \$10 to \$45), passports (\$85 for first issuance, \$55 for renewal, \$145 for expedited process), or certified naturalization papers (\$19.95). All the other briefs filed in support of the constitutionality of Section 523, discount the severity of the cost, both monetarily and logistically, of securing the required photo identification. However, one brief stands out among the rest and merits a reply.

On page 18, the Michigan House of Representatives' brief argues that Section 523 does not constitute an unlawful poll tax because if the "individual does not have the photo

identification described in the statute, such individual can simply sign an affidavit to that effect....**free-of-charge.**" (emphasis in original). This argument is flawed.

Our initial brief, at pages 13-18, demonstrated that the affidavit process is neither simple nor easy. In fact, were the affidavit process as simple and easy as the briefs filed in support suggest, then there would be no need to implement Section 523 in the first place. If voters without photo identification could simply sign an affidavit and cast their vote as easily as a voter with the required photo identification, then there would be no necessity for Section 523. However, the truth is that the affidavit process under Section 523 will make it much more difficult to vote. If it didn't then the affidavit process would simply be redundant to what already is required. That is, currently a voter prints their name and address, then signs their name, attesting to their identity. That clearly has the same effect as would signing an affidavit since MCL 168.932a makes it a felony for a person "at an election, [to] falsely impersonate another person, or vote or attempt to vote under the name of another person."

But under Section 523 persons not having photo identification are treated far differently since they are subject to a challenge process that is both burdensome and vague. Burdensome – because only those not having photo identification yet who otherwise have lawfully registered to vote (which doesn't require photo identification) will be subjected to questioning by election officials and challenges by "election challengers." Vague – because it is not known what might comply with Section 523's requirement of "other generally recognized picture identification card." Moreover, it is simply not known how extensive or time consuming the affidavit process will be. What is known, however, is that there are little or no limits currently in place to guide election officials in policing the process.

The Brief Amici Curiae Of Michigan County Clerks adds further support to this view. Section 523 will place not only a severe burden on those without the required photo identification, but also upon local county clerks responsible for implementing these requirements. That the Michigan Court Clerks have decided to weigh-in on this issue is significant because they provide a neutral perspective as to the impact of Section 523 as they state at page 1 that their "brief not to address the substantive merit of the photo identification requirement..." Throughout their brief, the Michigan County Clerks address the massive education and training that will be required in order to implement Section 523. Aside from the enormous publicity campaign required to educate voters on what photo identification is acceptable, the Michigan County Clerk noted the considerable guidance they would need to implement these requirements:

It will be necessary for the Secretary of State to issue guidance as to what documents will be acceptable under this latter category, just as the Secretary of State has issued guidance as to what identification is acceptable for those first time voters who are subject to the federal identification requirement. Both the voter and the elections inspectors will need this official guidance and this guidance will have to be created prior to the above described publicity campaign, since it will constitute an important aspect of the campaign.

It is significant that the experts in the area of election administration recognize and acknowledge the severe impact Section 523 will have on the elderly, the poor, and immigrant populations who do not possess State issued identification:

Voters who do not have these common forms of photo identification are most likely to be those who do not drive and these, in turn, are most likely to be older, and/or lower income voters, or immigrants. These voters will have to be given sufficient time to obtain the official state personal identification cards, as well as careful instructions as to where and how these can be obtained. It must be recognized that the very fact that these voters do not drive may make it more difficult for them to travel to the locations where the identification cards are obtained.

6. Strict scrutiny analysis is triggered where the State's voting regulation directly limits the right to vote.

The briefs supporting constitutionality rely upon *Timmons v Twin Cities Area New Party*.⁸ They argue that the State's "important regulator interest" of combating voter fraud is sufficient to justify the "reasonable, nondiscriminatory restrictions" contained in Section 523. They also argue that there is no requirement of "elaborate, empirical verification of the weightiness of the State's asserted justification." These arguments mistake the holding of *Timmons*.

In *Timmons*, the U S Supreme Court held that a Minnesota law that prohibited a candidate from appearing on the ballot twice, as the nominee for two different political parties, did not violate the Party's First and Fourteenth Amendment associational rights. The Court reasoned that, since the Minnesota law "did not directly limit the Party's access to the ballot," its restrictions "though not trivial" were not severe enough to trigger strict scrutiny analysis.⁹ Only after deciding to apply the lesser "sufficiently weighty" standard of review did the Supreme Court address the lower empirical verification standards needed to justify the Minnesota law.¹⁰ The facts in *Timmons*, are distinguishable from this case. Unlike *Timmons*, the photo identification and affidavit requirements of Section 523 will directly limit the right to vote of minorities, the poor, the elderly and the disabled by making it more difficult for them to cast their ballot. Under such a scenario, a strict scrutiny standard of review is warranted rather than the lesser "sufficiently weighty" standard of review and analysis used by the Supreme Court in *Timmons*.

⁸ *Timmons v Twin Cities Area New Party*, 520 US 351; 117 S Ct 1364; 137 L Ed2d 589 (1997).

⁹ *Timmons*, 520 US at 363.

¹⁰ *Timmons*, 520 US at 364.

7. The Indiana statute in *Indiana Democratic Party v Rokita* is clearly distinguishable from Section 523.

Those supporting constitutionality argue that this Court should follow the U S District Court's decision in *Indiana Democratic Party v Rokita*.¹¹ They contend that the Indiana statute is comparatively more burdensome than Section 523. In support, the briefs supporting constitutionality argue that Section 523 allows voters to present a "generally recognized picture identification card," as opposed to a government-issued identification card; to sign an affidavit at the polling place on election-day, if the voter does not possess the requisite photo identification, as opposed to casting a provisional ballot and being required to establish identity within 48 hours of voting. These claims are overstated. As noted in pages 32-33 of our initial brief, the Indiana statute in *Indiana Democratic Party v Rokita* is clearly distinguishable from Section 523. First, the Indiana statute contains an exception that allows persons in nursing homes to vote without photo identification. No similar exception exists in Section 523. Second, Indiana residents who meet the age of eligibility requirement to vote can obtain photo identification from Indiana free of charge. No provision for free photo identification is provided for under Section 523. Lastly, Indiana voters who appear at the polls without photo identification may cast a provisional vote and have that vote counted if they provide proof of identity, photo or non-photo identification, within 48 hours of voting. Section 523 does not provide for an alternative source of identification in its affidavit process. These distinctions make Section 523 more burdensome than the Indiana statute.

¹¹ *Indiana Democratic Party v Rokita*, 2006 US Dist LEXIS 20321 (2006).

8. **Just because the majority of Michigan registered voters possess the required photo identification, does not justify the possible exclusion of 350,000 registered Michigan voters who do not.**

On page 17 of the Attorney General's brief supporting the constitutionality of the photo requirement, it is argued that since the vast majority of Michigan registered voters possess some form of photo identification, they will experience little if any burden, if the requirements of Section 523 were implemented. This argument suggests that the exclusion of approximately 350,000 registered voters would have minimal impact, when compared to the majority of Michigan voters who possess the required photo identification. This argument is flawed. Even though most Michigan registered voters possess the required photo identification, the absence of registered voters who do not would decisively affect election results where races are decided by a margin considerably less than 350,000 votes.

Conclusion

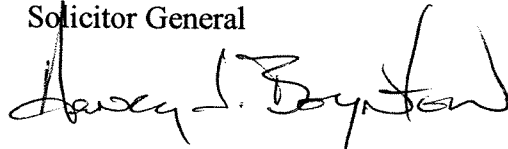
This Court lacks jurisdiction to issue an advisory opinion with respect to the photo identification requirements in Section 523, because the time during which this Court is permitted to do so under Mich Const 1963, art 3, § 8, has expired.

In any event, the photo identification requirements of Section 523, on their face, violate the Michigan and United States Constitutions for the reasons set forth in this Reply Brief and the Brief of Attorney General Opposing Constitutionality of 2005 PA 71.

Respectfully submitted,

Michael A. Cox
Attorney General

Thomas L. Casey
Solicitor General



Henry J. Boynton (P25242)
Assistant Solicitor General
Ron D. Robinson (P35927)
Assistant Attorney General
Division Chief
Civil Rights & Civil Liberties Division
Cadillac Place Bldg., Ste. 10-200
3030 W. Grand Blvd.
Detroit, MI 48202
(313) 456-0200

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